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No. 04- ____

In the Supreme Court of the United States

AMERICAN COLLECTIONS ENTERPRISE, INC.
Cross-Petitioner,

v.

POOJA GOSWAMI, Individually
and on behalf of all others similarly situated,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court of Appeals has ruled that an offer given by a debt collector to settle a debtor's uncontested debt for a reduced amount constitutes a violation of the federal Fair Debt Collection Practices Act ("FDCPA" or "Act") where the offer does not accurately reflect the authority given the debt collector by the creditor. The Court of Appeals' ruling is contrary to the purpose of the FDCPA, is contrary to rulings of other Circuits and is an absurd result of improper statutory interpretation. For the reasons stated in this Cross-Petition, this Court should review the following questions:

1) Whether Courts should interpret the Fair Debt Collection Practices Act in accordance with its purpose, as stated in 15 USC §1692, to avoid finding violations of Act provisions where there has been no abusive or coercive measures taken in the collection of a debt?

2) Whether Courts should look beyond the collector's communication with a debtor to include the terms of an agreement between a creditor and a debt collector when determining whether a collector has violated 15 USC §1692e(10) of the Fair Debt Collection Practices Act?

PARTIES TO THE PROCEEDING

Cross-Petitioner is American Collections Enterprise, Inc.

Respondent is Pooja Goswami.

RULE 29.6 STATEMENT

Cross-Petitioner agrees with the Rule 29.6 statement of Petitioner.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINION AND ORDER BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE CROSS-PETITION 4

I. There Is a Conflict of Decisions Between the Courts of Appeals for the Fifth and Sixth Circuits on the Issue of Whether a Debt Collector Violates the Fair Debt Collection Practices Act by Making a Noncoercive Settlement Offer of the Debt in a Reduced Amount, but Which Does Not Reflect the Creditor's Most Beneficial Settlement Terms Possible 5

A. The Sixth Circuit's Opinion in *Lewis v. ACB Business Services, Inc.* 5

B. The Fifth Circuit's Opinion in the Case Below 9

II. The Court of Appeals, by Not Interpreting the Language of 15 USC §1692e(10) in Accordance with the Purpose of the Legislation as Required by this Court in *United States v. American Trucking Ass'ns,* 310 U.S. 534, 543, 60 S.Ct. 1059, 1064, 84 L.Ed. 1345 (1940) Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings, as to Call for an Exercise of this Court's Supervisory Powers 10

III. The Court of Appeals, by Deciding That a Debt Collector Is Exposed to Penalties under 15 USC §1692e(10) by Making a Settlement Offer of Less Than Full Authority Given by the Creditor to Resolve the Outstanding Debt, Has Decided an Important Question of Federal Law That Has Not Been, But Should Be, Settled by this Court 15

A. The Court of Appeals Decision will Affect Interpretations of Other Provisions of the FDCPA 15

B. The Fifth Circuit's Broad Pronouncement Invades Attorney-Client Relationships 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Goswami v. American Collections Enterprise, Inc.,
280 F. Supp. 2d 624 (S.D. Tex. 2003) 3, 18

Goswami v. American Collections Enterprise, Inc.,
377 F.3d 488 (5th Cir. 2004) 3, 5, 17

Heintz v. Jenkins,
514 U.S. 291, 115 S.Ct. 1489 (1995) 17, 18

Holy Trinity Church v. United States,
143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892) . . 12

Lewis v. ACB Business Services, Inc.,
135 F.3d 389 (6th Cir. 1998) . . . . . *passim*

Pressley v. Capital Credit & Collection Service, Inc.,
760 F.2d 922 (9th Cir. 1985) 12, 13

United States v. American Trucking Ass'ns,
310 U.S. 534, 60 S.Ct. 1059,
84 L.Ed. 1345 (1940) 6, 10, 14

United Steelworkers of America v. Weber,
443 U.S. 193, 99 S.Ct. 2721,
61 L.Ed.2d 480 (1979) 12

Statutes and Rules

15 U.S.C. § 1692 . . . . . 1, 4, 9, 12
15 U.S.C. § 1692(a) 14
15 U.S.C. § 1692c(c) 6, 13, 16
15 U.S.C. § 1692c(c)(2) 5, 6, 9, 13
15 U.S.C. § 1692e 1, 15
15 U.S.C. § 1692e(10). . . . . *passim*
15 U.S.C. § 1692e(11) 12, 13
15 U.S.C. § 1692(e) 15

Other Authority

123 Cong.Rec.S. 27,386 (daily ed. Aug. 5, 1977) 13

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rules 12.5 and 13.4 of this Court's rules, Cross-Petitioner, American Collections Enterprise, Inc., respectfully requests that, if the Court grants the petition for writ of certiorari in the instant matter, then the Court should issue a writ of certiorari to review the judgment of the Court of Appeals on the questions presented in this conditional cross-petition.

OPINION AND ORDER BELOW

The Cross-Petitioners incorporate by reference the "Opinions Below" section of Petitioner's Petition for Writ of Certiorari.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit issued its opinion on July 28, 2004. A Petition for Rehearing was denied on December 22, 2004. The Goswami Petition for Writ of Certiorari was filed on March 22, 2005, and the response date is set for April 25, 2005. The Court has jurisdiction over this Cross-Petition under 28 USC § 1254(1) and Rules 12.5 and 13.4 of this Court.

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions involved are 15 USC §§ 1692 and 1692e. (App. A at 1b-4b).

STATEMENT OF THE CASE

Pooja Goswami sued American Collections Enterprise, Inc. ("ACEI") claiming that an offer of settlement in the letter from ACEI violated her rights under Section 1692e(10) of the FDCPA. The letter offered a 30% discount off her uncontested debt if she accepted the offer within 30 days. There was no contention that the offer was in any way unavailable as written, and Goswami never contacted ACEI to either accept or reject the offer. Goswami argued that the creditor, in this case Capital One, had authorized ACEI to settle her Visa debt with a greater discount, which was available for a longer period of time, and, therefore, an offer less than the amount authorized was deceptive and a violation of Goswami's rights under the FDCPA.

The District Court held in favor of ACEI after a hearing on a motion for summary judgment, stating that the agreement between ACEI and Capital One should not be considered in determining a violation under section 1692e(10). The District Court held,

> [Goswami] is not a party to the [ACEI]-Capital One contract, nor is she a beneficiary of it. Goswami understands the statute to require an agent to disclose its principal's confidential instructions about levels of compromise. If her position were correct, collection agencies -- and negotiations to settle debts -- would be eliminated entirely. A negotiating position is not exactly a fact; it is a contingent fact, binding as fact only if it is accepted. Bidding low is not deceitful. The letter was an offer -- a negotiating position. The law does not bar [ACEI] from offering to settle the debt at a thirty percent discount with no questions asked for thirty days. Under the statute, [ACEI's]

> statements may be false if it intended when it sent the letter to reject Goswami's payment, or if it actually rejected her payment after she accepted the offer. Goswami did not accept the offer, so she cannot claim the latter; she has no proof of the former.[1]

Goswami appealed to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals reversed the judgment of the District Court with respect to whether the settlement offer violated 15 USC § 1692e(10).[2] Although the Fifth Circuit recognized that offers of settlement are favored under the FDCPA[3], the Court ultimately concluded that the offer in this case was a violation of section 1692e(10) because the offer did not accurately reflect the creditor's discount authority. In so holding the Fifth Circuit stated,

> ACEI made false or misleading statements about the settlement authority it held from Capital One both in the discount it was authorized to offer and the time within which Goswami was allowed to accept the offer. ACEI's deception is actionable under the FDCPA and is not excused because it is part of a debt collector's settlement offer.[4]

The Fifth Circuit cited *Lewis v. ACB Business Services, Inc.*, 135 F.3d 839 (6th Cir. 1998), for the proposition that settlement agreements are favored but implicitly ignored the Sixth Circuit's ruling that the agreement between the debt

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[1] *Goswami v. American Collections Enterprise, Inc.*, 280 F. Supp. 2d 624, 627 (S.D. Tex. 2003).
[2] *Goswami v. American Collections Enterprise, Inc.*, 377 F.3d 488, 496 (5th Cir. 2004).
[3] 377 F.3d at 495-96.
[4] 377 F.3d at 496.

collector and creditor is not relevant in determining whether the FDCPA has been violated.

ACEI petitioned the panel for rehearing asserting the argument that an offer presented by a collector which provided a no-strings-attached benefit to the debtor is not the type of "abusive" behavior that Congress intended to prevent as stated in 15 USC § 1692. The panel denied rehearing without reason on December 22, 2004.

REASONS FOR GRANTING THE CROSS-PETITION

This Cross-Petition for writ of certiorari should be granted for the following reasons: Initially, there is a conflict of decisions between the Circuit Courts of Appeal on the issues of whether non-coercive settlement offers violate the FDCPA and whether an underlying agreement for collection of bad debts between a creditor and a collector should be considered in determining FDCPA liability of the debt collector; secondly, the Court of Appeals has so departed from the accepted and usual course of statutory construction as to require this Court to exercise its supervisory power to correct it; thirdly, by deciding that a collector's offer of settlement of an uncontested debt violates the FDCPA even if the offer stated is within authorized parameters, the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

I. There Is a Conflict of Decisions Between the Courts of Appeals for the Fifth and Sixth Circuits on the Issues of Whether a Debt Collector Violates the Fair Debt Collection Practices Act by Making a Noncoercive Settlement Offer of the Debt in a Reduced Amount, But Which Does Not Reflect the Creditor's Most Beneficial Settlement Terms Possible

The Sixth Circuit Court of Appeals' opinion in *Lewis v. ACB Business Services, Inc.*, 135 F.3d 839 (6th Cir. 1998), is in conflict with the Fifth Circuit Court of Appeals' opinion below in *Goswami v. American Collections Enterprise, Inc.*, 377 F.3d 488 (5th Cir. 2004).

A. The Sixth Circuit's Opinion in *Lewis v. ACB Business Services, Inc.*

In *Lewis v. ACB Business Services, Inc.*, the Court of Appeals for the Sixth Circuit decided that where the language of the FDCPA is broader than the declared purpose, the Courts should look to the reason for the legislation for proper interpretation. The Sixth Circuit found that noncoercive settlement offers are favored under the FDCPA and sections of the Act that would tend to prohibit such a benefit to the debtor are in direct variance with the Act's purpose. Unlike the Fifth Circuit, the Sixth Circuit also discussed that the collection agreement between the creditor and the collector was not relevant to consideration of FDCPA violations committed by the collector in its efforts to recover the debt owed by the debtor.

In *Lewis* the Court addressed the questions of whether a letter offering a payment arrangement to a debtor and a phone call placed to debtor, after a cease communications letter was received by the collector violated 15 USC § 1692c(c)(2).